

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
250 Washington Street, Boston, MA 02108-4619

CHARLES D. BAKER
Governor

KARYN E. POLITO
Lieutenant Governor

MARYLOU SUDDERS
Secretary

MONICA BHAREL, MD, MPH
Commissioner

October 31, 2018

Tel: 617-624-6000
www.mass.gov/dph

Via Regular & Electronic Mail (42963-15331692@requests.muckrock.com)

MuckRock News
DEPT MR 42963
411A Highland Ave
Somerville, MA 02144-2516
Attn.: Shawn Musgrave

Re: Your Public Records Requests (Tracking Number OGC-2018-15)

Dear Mr. Musgrave:

This letter is in regard to the above referenced public record request received by the Department of Public Health (DPH), on October 15, 2018. This request has been assigned a tracking number: OGC-2018-15. Specifically, you requested:

"All documents provided to Jamie Folk pursuant to public records requests filed since 2015."

Enclosed please find three (3) thumb drives that contain 39,784 records (168,952 pages) that may be responsive to your request and subject to disclosure under the public records law. Please note that certain portions of these records have been redacted and/or some records withheld from disclosure due to an exemption(s) delineated under G.L. c. 4, § 7(26), *et seq.*, as specified below.

Specifically, some information (e.g. social security numbers, personal email accounts and personal cellular phone numbers) is exempt from disclosure pursuant to G.L. c. 4, § 7(26)(c) (the "Privacy exemption") as said information is of a highly personal nature; the disclosure of which may constitute an unwarranted invasion of personal privacy. Similarly, some other records have also been redacted under the Privacy exemption because said records contain individual employee evaluations, the release of which could disrupt DPH's ability to function effectively as an employer and, therefore, fall squarely within the legislature's contemplated exemption. *See Wakefield Teacher's Association v. School Committee of Wakefield*, 431 Mass. 792, 798 and 802 (2000); *see also Brogan v. School Committee of Westport*, 401 Mass. 306, 308 (1987). Moreover, the Massachusetts Fair Information Practices Act (FIPA) prohibits the public release of such personal information without authorization or specific legal authority. *See G.L. c. 66A*. Since maintaining the privacy of such information outweighs any public interest in its disclosure,

it follows that said FIPA protected information is statutorily exempt from disclosure pursuant to G.L. c. 4, §7(26)(a) (exempt by statute or necessary implication thereof).

Additionally, other information (e.g. drug lab sample identification numbers, criminal case docket numbers and defendants' names) was also redacted pursuant to G.L. c. 4, §7(26)(a), to the extent that said information relates to the nature of a criminal charge or is the result of the initiation of a criminal proceeding and would directly, or in combination with the other available information, identify specific individuals. This information is considered Criminal Offender Record Information (CORI) and, therefore, also statutorily exempted from public disclosure by the CORI Statute. *See* G.L. c. 6 § 172.

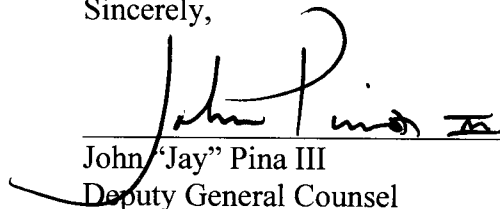
Furthermore, certain records have been withheld pursuant to G.L. c. 4, § 7(26)(n), as the disclosure of said records, in the reasonable judgment of the DPH, is likely to jeopardize the security of DPH's computer network. The withheld records, for purposes of exemption (n), include internal passwords and procedures which relate to the remote accessing of DPH's server, the disclosure of which could endanger DPH's internal infrastructure. These withheld records are also exempt under G.L. c. 4, § 7(26)(b), because if made public, such information could hinder the proper performance of necessary governmental functions by providing opportunities to disrupt DPH's computer operations and risk potential confidential data breaches. Finally, some of the records reflect communications with attorneys in DPH's Office of General Counsel concerning legal advice or materials created by counsel related to potential or pending litigation. Accordingly, these records have been redacted or withheld to ensure protected work product and attorney-client communication are preserved and not disclosed.

DPH reserves the right to retrieve any exempted, privileged, or otherwise protected materials inadvertently included in this production. Any such production is not, and shall not be considered or deemed, a waiver of any applicable privileges or protections from disclosure. Plus, the Public Records Law authorizes a state agency to charge a reasonable fee for the production of public records. *See* G.L. c. 66, § 10(d); 950 CMR 32.08(2). As the cost for providing you with this response is nominal, DPH is waiving the fees in this instance.

DPH now considers this PRR closed. If you wish to challenge this response, and your request was received in writing, you may appeal to the Supervisor of Records following the procedure set forth in 950 CMR 32.08, a copy of which is attached. Pursuant to G.L. c. 66, § 10A, you may also seek judicial review by commencing a civil action in Suffolk Superior Court.

Please feel free to contact me with any questions. In any communication regarding this request, please reference the assigned tracking number OGC-2018-15.

Sincerely,


John "Jay" Pina III
Deputy General Counsel

cc: Margret Cooke, DPH General Counsel (via email)
Helen Rush-Lloyd, DPH Records Access Officer (via email)
Ann Scales, DPH Media Relations Manager (via email)

Code of Massachusetts Regulations
Title 950: Office of the Secretary of the Commonwealth
Chapter 32.00: Public Records Access (Refs & Annos)

Effective 1/1/17

950 CMR 32.08
32.08: Appeals

32.08: Appeals

(1) Appeals to the Supervisor.

- (a) 950 CMR 32.08 shall not apply to records in which an individual, or a representative of the individual, has a unique right of access to the records through statutory, regulatory, judicial or other applicable means.
- (b) a requester may petition the Supervisor for failure by a records access officer to comply with a requirement of 950 CMR 32.00.
- (c) an oral request, while valid as a public record request, shall not be the basis of an appeal under 950 CMR 32.08.
- (d) petitions for appeal of a response by a records access officer must be made within 90 calendar days of the date of the response by a records access officer.
- (e) petitions for appeal of a failure to respond within the timeliness requirements of 950 CMR 32.00 must be made within 90 calendar days of the request.
- (f) all petitions for appeal shall be in writing and shall specifically describe the nature of the requester's objections to the response or failure to timely respond.
- (g) requesters shall provide to the Supervisor complete copies of all correspondence associated with the petition, including:
 - 1. a complete copy of the letter by which the request was made, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses; and
 - 2. a complete copy of all written responses associated with requests subject to the petition for appeal, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses.
- (h) in petitioning the Supervisor, the requester shall provide a copy of such petition to the records access officer associated with such petition.
- (i) if the requester's petition for appeal is related to a previous appeal to the Supervisor, the requester's petition shall refer to the previous appeal number.
- (j) petitions under 950 CMR 32.08 received before 4:00 P.M. shall be opened on the day of receipt. Petitions received after 4:00 P.M. shall be opened on the following business day.

(2) Dispositions of Appeals

- (a) the supervisor shall issue a written determination regarding any petition submitted in accordance with 950 CMR 32.08(1) not later than ten business days following receipt of the petition.
- (b) the Supervisor may deny an appeal for, among other reasons if, in the opinion of the Supervisor:
 - 1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation;
 - 2. the request is designed or intended to harass, intimidate, or assist in the commission of a crime;
 - 3. the public records request is made solely for a commercial purpose;
 - 4. the requester has failed to comply with the provisions of 950 CMR 32.08(2).

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- (c) upon a determination by the Supervisor that a violation has occurred, the Supervisor shall order timely and appropriate relief.

(3) Hearings and Conferences.

- (a) the Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure*. The decision to hold a hearing shall be solely in the discretion of the Supervisor.
 - 1. said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.08.
 - 2. nothing in 950 CMR 32.08 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.
- (b) the Supervisor may order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding. The decision to hold a conference shall be solely in the discretion of the Supervisor.

(4) In Camera Inspections and Submissions of Data.

- (a) the Supervisor may require an inspection of the requested record(s) in camera during any investigation or any proceeding initiated pursuant to 950 CMR 32.08.
- (b) the Supervisor may require the records access officer to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.08.
- (c) the Supervisor does not maintain custody of documents received from a records access officer submitted for an in camera review. The documents submitted for an in camera review do not fall within the definition of public records. M.G.L. c. 4, §7(26).
- (d) upon a determination of the public record status of the documents, they are promptly returned to the custodian, and no copies shall be retained by the Supervisor.
- (e) any public record request made to the Division for records being reviewed in camera would necessarily be denied, as the office would not be the custodian of those records.
- (f) attorney-client privileged records voluntarily submitted to Supervisor:
 - 1. a records access officer may voluntarily submit documents to the Supervisor for in camera review;
 - 2. such submission shall not waive any legally applicable privileges claimed by the agency or municipality.

(5) Custodial Indexing of Records

- (a) the Supervisor may require a records access officer or custodian to compile an index of the requested records within the context of a public records appeal number under 950 CMR 32.08.
- (b) said index shall be a public record and shall meet the following requirements:
 - 1. the index shall be contained in one document, complete in itself;
 - 2. the index shall adequately describe each withheld record or redaction from a released record;
 - 3. the index must state the exemption or exemptions claimed for each withheld record or each redaction of a record; and
 - 4. the descriptions of the withheld material and the exemption or exemptions claimed for the withheld must be sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether the material is exempt.
- (c) nothing in 950 CMR 32.08 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.